

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-2455

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Raphael J. Costanzo,

Plaintiff-Appellant

vs.

Stanley Arron, Visa Therm Products, Inc.,
Anna Arron, Anna Arron Executrix of
Estate of Max Arron,

Defendants-Appellees.

CIVIL APPEAL
Docket No. 74-2455

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT.

HONORABLE THOMAS F. MURPHY, Judge
(Non-Jury)

REPLY BRIEF FOR PLAINTIFF-APPELLANT
RAPHAEL J. COSTANZO AND TIMELY
PRODUCTS CORPORATION

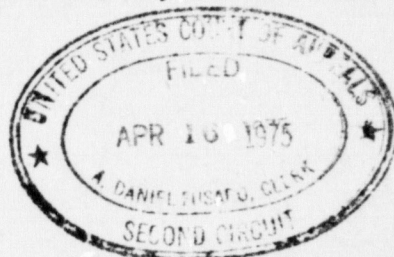
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3

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases Cited	i
Table of Statutes Cited	ii
Table of Exhibits Cited	iii., iv.
Reply to Defendants' Statement	1
With Respect to the Obviousness of the Arron Sock Invention - Point I of Defendants' Brief	5
The Costanzo Patent	8
The Issue of Arron's Rule 131 Affidavit - Point II	12
With Respect to Point III - Timely's Alleged Infringement Letters	15
With Respect to Point IV of Defendants' Brief	16
With Respect to Point V of Defendants' Brief - The Seneca Cancellation	17
With Respect to Point VI and VII of Defendants' Brief - "On Sale" of Arron's Heater Patent (PX-3) and Obviousness Thereof	18
Conclusion	20
Appendix	21

TABLE OF CASES CITED

	<u>Page</u>
<u>Adams v. U.S.</u> 383 US 51	8
<u>Georgia Pacific Corp. v. U.S. Plywood</u> 258 F ² 124 (2 Cir.)	12
<u>Graver Tank & Mfg. Co. v. Lind Air Products</u> 339 U.S. 605	11
<u>Kurtz v. Bell Hat Lining Co.</u> 280 F 281 (2 Cir.)	12
<u>Monoplastics Inc. v. Caldor</u> 387 F ² 20 (2 Cir. 1967)	14
<u>Phillips Electronics & Pharmaseutical Industries Corp. v. Thermal & Electronics Industries, Inc.</u> 450 F ² 1164 - (CANJ. 1971)	2
<u>Rooted Hair Inc. v. Ideal Toy Co.</u> 329 F ² 761	14
<u>Shaw v. E.B. Whiting Company</u> 317 F ² 1097 (2 Cir.) Cert. denied 397 U.S. 1076	12
<u>Thompson v. American Tobacco</u> 174 F ² 773	14
<u>United Shoe Mach. Corp. v. Brooklyn Wood Heel Corp.</u> 77 F ² 263,264 (2 Cir.)	15
<u>Winan v. Denmead</u> 56 US 530	12

TABLE OF STATUTES

	<u>Page</u>
35 USC 282	2
35 USC 287	16
35 USC 102 (b)	19

PATENT OFFICE RULES

Rule 131	12, 13, 14
----------	------------

TABLE OF EXHIBITS

		<u>Page.</u>
PX-1	Costanzo Patent 3,293,405	4,5,7,9,11, 14,19
PX-2	Arron Patent 3,392,264	1,2,6,7,12,13, 15,19
PX-3	Arron Heater Patent	19
PX-8	Arron Commercial Sock	9
PX-11	Shelton Holsery Confidential Agreement	3
PX-35	Gorbach Confidential Disclosure Agreement	2
PX-49	Arron - Seneca Contract	17
PX-76	Arron Letter 1/4/65 to N.Y. TIMES	3
PX-84	Arron Sock	14
PX-96	Arron Registered Letter 12/18/64	2
PX-281C	McCarthy Confidential Agreement	2
PX-282	Arron to Seneca Cancellation Letter	5, 17
PX-283	Seneca to Arron Cancellation Letter	5, 17
PX-325	6 Volt Battery Sock	1, 5, 7
PX-472	Outdoor Life Advertisement	18
PX-474	Costanzo Patent Drawing	9
PX-475	Drawing of Arron Commercial Sock	9, 11
PX-493	First Proof of Outdoor Advertisement	18

TABLE OF EXHIBITS (Cont'd)

		<u>Page.</u>
PX-535	Arron Concept Drawing	12
PX-539	Dubrow Drawing	6, 8
DX FIF	Alleged Sample of Sock submitted to J.C. Penney	4, 5
DX-NN-4	Letter to Defendant Visa Therm Products 3/11/67	15
DX-NN-5	Letter to Defendant Max and Anna Arron 4/8/67	15
DX-NN-10	Letter to Hygrade Cultery 11/2/67	15
DX-NN-13	Letter to Hygrade Cultery 11/16/67	15
DX-NN-14	Letter to Original Defendant Chervanck 3/11/67	15
DX-NN-15	Letter to Original Defendant Sulzychi	15
DX-NN1-15	Alleged Infringement Letter	15

REPLY TO DEFENDANTS' STATEMENT.

This reply is being made in behalf of Plaintiff-Appellant, Raphael J. Costanzo and his co-plaintiff below, Timely Products Corporation to rebutt statements and arguments presented by Defendants-Appellees in their main brief which was filed in the above appeal on/or about March 15, 1975.

In Defendants-Appellees- "Statement of Case" on page 1 of their Brief, it is stated that the lower court held:

"Arron's sock patent invalid as obvious against Costanzo"

This statement by Defendants-Appellees is only partly true.

The Trial Court actually held:

"It is more than likely that the Arron sock patent is obvious in light of the prior art even without the Costanzo reference. However, a consideration of the Costanzo patent as prior art strengthens the conclusion that the Arron sock patent is invalid for obviousness." (Joint Appendix 97)xxxxxxx

"The location of the heating element is obvious in light of Costanzo and the commercial socks. In light of the teaching of Costanzo, the commercial socks, Theodore, Carrona, Jacobsen, Marick and the British Patent, U.S. Rubber, the construction of the heating element and the low heat conductivity of the covering material claimed by Arron sock patent are obvious." (Joint Appendix 98)

It is to be further noted that the prior art on which the lower court relied to support its conclusion of obviousness of the Arron sock patent (PX-2), viz., the commercial socks (PX-325) and the Theodore Patent were not cited by the Patent Office during

prosecution of the Arron sock patent (PX-2). Thus, any presumption of validity which is accorded a patent grant pursuant to 35 USC 282 is substantially weakened, if not destroyed, when pertinent prior art is not considered by the Patent Office. Phillips Electronics & Pharmaseutical Industries, Corp. v. Thermal & Electronics Industries, Inc. CANJ (1971) 450 F² 1164.

Plaintiff-Appellant further wishes to point out that certain statements made by Defendants-Appellees with respect to their "Statement of Facts" on pages 3, 4, and 4A of their brief are not accurate. In this statement, Defendants-Appellees imply that Costanzo began working on a "sock heating element" after Arron's visit with McCarthy at the end of 1964 (December 30, 1964) and on January 5, 1965.

The evidence at trial clearly established that Defendant Arron was disclosing Costanzo's sock concepts to others prior to visiting Mr. McCarthy on December 30, 1964. A disclosure was made by Arron to Irving Gorbach on December 17, 1964 (PX-35) several weeks before Arron visited Sonotone. In a registered letter (PX-96) dated December 18, 1964, Defendant Arron recorded numerous Costanzo concepts including Costanzo's battery operated belts, socks, and gloves. In fact, Arron's trip to Sonotone was for the specific purpose of disclosing Costanzo concepts to Sonotone. Mr. McCarthy of Sonotone at the request of Arron executed a Confidential Dislosure Agreement (PX-281C) on January 5, 1965. The same

day Arron disclosed samples of the Costanzo heated sock to Shelton Hosiery Co. (PX-11). Reference is also made to Defendants' answer to Plaintiff's Interrogatory No. 86.¹

Also, on January 4, 1965, the day before Arron and Costanzo met with Mr. McCarthy, Arron was already responding to advertisements placed in the New York Times with respect to the Costanzo sock concepts (PX-76).

On page 4 of Defendants' brief it is alleged that U.S. Patent No. 3,079,486 "shows in Figure 5 a heated sock having an attached pocket for receiving a battery." A study of this patent will evidence that the structure disclosed is directed not to a sock, but to an "enclosure" to be worn over a sock.²

1

Plaintiff's Interrogatory No. 86: Was the disclosure of the heated sock made to Shelton Hosiery by Stanley Arron, as alleged in answer to Interrogatory No. 13 by way of:

- (a) an actual sample or model of an electric sock,
- (b) drawings of electric socks
- (c) written description of electric sock
- (d) oral description of electric sock.

Defendants' answer: Actual sample (a).

2

Col. 2, lines 41 - 56 of Patent 3,079,486 reads:

"Figure 5 shows a modified form of heater device 10^a having a single battery in pocket 24^a forming one end of an enclosure member 59 adapted to fit over a sock and secured to the ankle portion 61 of the sock by stitching 60." [emphasis added]

As is more fully set forth in Plaintiff's main brief, Patent No. 3.079,486 was considered, cited and rejected by the Patent Office during the prosecution of the Costanzo Patent in suite (PX-1). Furthermore, as set forth in Plaintiff's main brief, Plaintiff's expert Mr. Dennis Murphy pointed out that the structure of this cited patent was inoperable, and this fact was not disputed by Defendants' expert, Mr. Dubrow.

The testimony of Mrs. Kathleen Biafore and Anthony Costanzo clearly substantiated the facts noted in Costanzo's notebook.³

On page 4 of Defendants' Reply Brief reference is made to Defendants' exhibit DX FIF as a sock sample submitted to J.C. Penny for testing. It was alleged by Defendants that this DX FIF was submitted to J.C. Penny in 1965 by Seneca, Defendants' licensee.

Exhibit DX FIF was an electric sock having a battery holder which contained a legend "Ski Lectric." It was established at trial that Defendants did not use the term "Ski Lectric" until some time after 1966. (T.T. pages 1480, 1481)⁴. In view

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Both Mrs. Biafore and Anthony Costanzo testified that Costanzo had showed and discussed with each his electric sock invention in March 1964. See Plaintiff's Appendix 192-194 with respect to Mrs. Biafore and trial transcript pages 1304-1305 with respect to Anthony Costanzo, which is attached to this reply; and attached appendix 1. and 1A.

4

T.T. refers to the trial transcript, the identified pages being attached hereto as Appendix 2, 2A.

of Defendants' own testimony, the authenticity of DX FIF is placed in extreme doubt since it is difficult to comprehend how a DX FIF with a 1966 vintage battery holder could have been submitted to J.C. Penny in 1965 as alleged.

On page 4A, Defendants state that Seneca terminated its contract with Arron because of Timely's conversation with Seneca. However, the evidence presented at trial, and as so found by the Trial Court, proves that Arron and Seneca terminated their own agreement, each alleging that the other was in breach. (PX-282) (PX-283).

WITH RESPECT TO THE OBVIOUSNESS OF THE ARRON SOCK
INVENTION. POINT I OF DEFENDANTS' BRIEF.

The Trial Court was correct in finding the Arron Sock Patent invalid. The Costanzo patent (PX-1) which the Court found was prior art as against Arron, discloses substantially all of the features being claimed by Arron. As the Trial Court noted all four claims of the Arron sock patent were in issue. The Trial Court was undoubtedly correct when it noted that the Arron and Costanzo sock patents are essentially the same. (Joint Appendix 92) The Arron claims further lacked any teaching of battery size and/or of battery location. The language of the Arron claims is such that they would clearly fall within the teaching of the prior commercial socks evidenced by PX-325. It

was also brought out at trial that while Arron makes claim to a covering material to "decrease the spread of heat" there is absolutely no basis for this feature set forth in the detailed description of the Arron patent.

Furthermore, Mr. Dubrow, Defendants' own expert, testified (T.T. 1856 - 1858)* (PX-539)** that the heat transfer between the resistor and a covering material will be similarly conducted regardless of the nature of the covering material. Thus, in effect, Defendants' own expert, Mr. Dubrow, substantiated the testimony of Mr. Dennis Murphy, Plaintiff's expert, that the Arron sock patent is the full equivalent of the Costanzo patented construction.

Defendants allude to numerous reasons for urging patentability of the Arron sock patent (PX-2) in their brief. However, a reading of the Arron claims as stated in the patent, fail to express those features of patentability which Defendants urge in their brief. Since it is well established that the claims of the patent constitute the metes and bounds of an invention, the arguments referred to in Defendants' brief can be of no avail, since the substance of Defendants' argument, even if considered meritorious, which they are not, cannot be found in any of the Arron claims.

*

Attached hereto as Appendix 3, 3A and 3B.

**

Located in the Exhibit Appendix.

The District Court was undoubtedly correct when it found that the Arron sock patent (PX-2) is invalid and obvious in view of the Costanzo Patent (PX-1)⁵, the prior commercial socks (PX-325)⁶, and the prior art patents to Theodore⁶, Carrona, Jacobsen, Marick and British Patent to U.S. Rubber.

It is to be further noted that the District Court made ample findings of facts that Defendant Arron was guilty of "unclean hands" during the prosecution of his sock patent (PX-2) before the U.S. Patent Office inasmuch as Arron's conduct "was both willful and in bad faith" (Joint Appendix 105). Thus the District Court was also correct in finding that the Arron sock patent (even if presumed valid) could not be enforced because of Arron's conduct before the Patent Office in connection with his Rule 131 Affidavit. (Joint Appendix 105).

5
The Examiner withdrew this patent as a reference during the prosecution of the Arron sock patent application because of Arron's Rule 131 Affidavit which the Trial Court found was not filed in good faith by Arron.

6
Prior art not cited or considered by the Patent Office during the prosecution of the Arron sock patent (PX-2).

THE COSTANZO PATENT.

In Defendants' brief, the defendants are urging this Court to read into Costanzo's claim 2 a limitation which is not present therein. Nowhere in claim 2 is there a limitation that the covering material must be aluminum. This fact was so noted by the Trial Court. (T.T. page 143)⁷ As Mr. Dubrow, Defendants' own technical expert testified, the nature of the covering material does not alter the manner in which heat is transferred from the resistor strip to the covering material. (PX 539) (T.T. pages 1856 - 1858)⁸

Furthermore, Defendants failed to introduce any prior art to negate the novelty and/or obviousness of Costanzo's "wholly self-contained sock" having a heater which could be effectively energized by a 1 1/2 volt flashlight type battery, and which heater consisted of a flat resistor strip sandwiched between a pair of heat conducting sheets located in the toe portion of the sock.

A study of the prior art introduced at trial will clearly evidence that no one prior to Costanzo conceived or contemplated a self-contained electrically heated sock which could be energized by a 1 1/2 volt flashlight type battery. The record is clear that Costanzo taught away from the known art; Adams v. U.S.

383 U.S. 51. The record is also clear that the Defendants copied

7

Attached as Appendix 4 hereto.

8

Attached as Appendix 3, 3A, and 3B.

the very essence of the Costanzo invention.

To illustrate how the defendants literally appropriated and imitated Plaintiff Costanzo's invention, reference is made to the attached chart which for convenience constitutes a reproduction of the Costanzo patent drawing (PX-474); a chart wherein each element of claim 2 of the Costanzo patent is separately listed and whereby opposite thereto is set forth the equivalent structure found in Defendants' commercial sock PX-8 as illustrated by a drawing PX-475.⁹

9
This drawing PX-475 is a reproduction of an enlarged blow up which was placed in evidence during the trial and which the Defendants agreed is an accurate representation of Defendants' commercial sock PX-8. The attached drawing PX-475 is illustrated with reference numbers which do not appear on the original exhibit. The reference numbers have been added merely for purposes of pointing out the equivalent structure found in the Costanzo Patent (PX-1).

A blow up of Costanzo's patent drawing was introduced into evidence as PX-474.

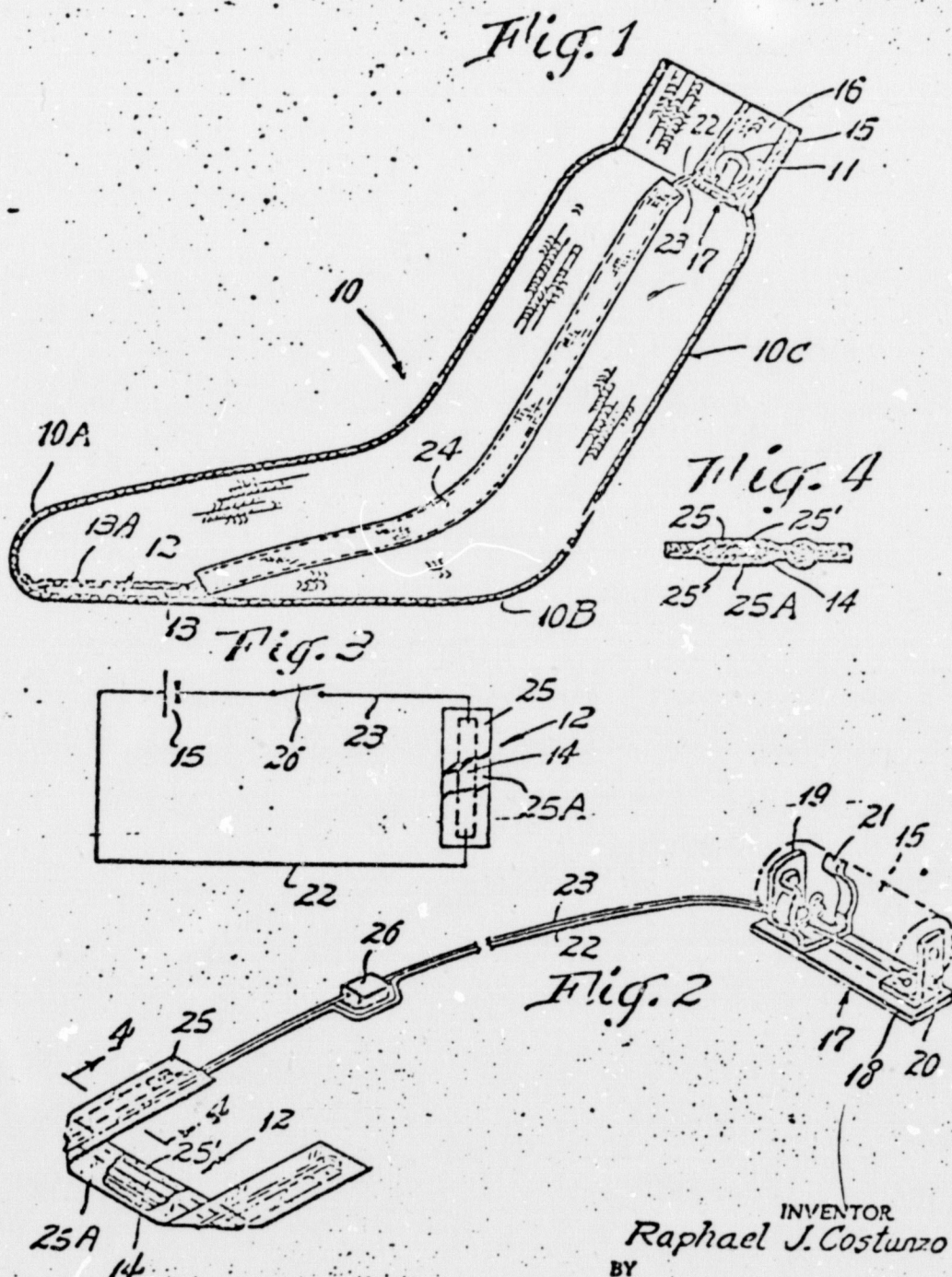
Dec. 20, 1966

R. J. COSTANZO
ELECTRICALLY HEATED FOOTWEAR

Filed Sept. 13, 1965

3,293,405

PX 474



INVENTOR
Raphael J. Costanzo
BY
Arthur J. Fattine
ATTORNEY

The Costanzo Patented Claim 2

In combination

(a) a woven sock 10 having a toe portion 10A, a heel portion 10B and a connected leg portion 10C,

(b) means defining a pocket 16 adjacent the upper end of said leg portion adapted to receive a low voltage battery of less than 6 volts,

(c) electrical non-conductive means 13 defining a pocket in the toe portion of said sock,

(d) a heater 12 disposed in said toe pocket,

(e) said heater 12 including a flat resistor strip 14 of electrical resistant material,

(f) radiation means 25 connected in heat transfer relationship to said flat resistor strip for defining an expanded radiation surface for said heater,

(g) said radiation means including a pair of heat conducting sheets of material 25, 25A for sandwiching said resistor strip 14 in heat transfer relationship therebetween,

(h) means 25' joining said heat conducting strips together and electrically insulating said strips from said resistor strip,

(i) electrical conductors 22, 23 connecting said resistor strip in circuit to said battery, and

(j) means 24 maintaining said conductors against the leg portion of said sock.

Defendants' Commercial Structure PX-8 (PX-475.)

PX-475 which was admitted as an accurate representation of Defendants' commercial heated sock 10 has a toe portion 10A, heel portion 10B and a connected leg portion 10C,

Defendants' structure has a pocket 16 adjacent the upper end of the leg portion adapted to receive a battery of less than 6 volts,

Defendants' structure has a fabric electric non-conductive means 13 to form a pocket in the toe portion 10A,

Defendants' structure has a heater 12 in the toe pocket 13,

Defendants' heater includes a flat resistor strip 14 of electrically resistance material,

Defendants' structure has a "radiation means", i.e. a covering material 25 connected into heat conducting relationship with the resistor strip to define an expanded radiation surface for the heater,

Defendants' structure includes a pair of heat conducting sheets of material 25, 25A for sandwiching said resistor strip in heat transfer relationship therebetween,

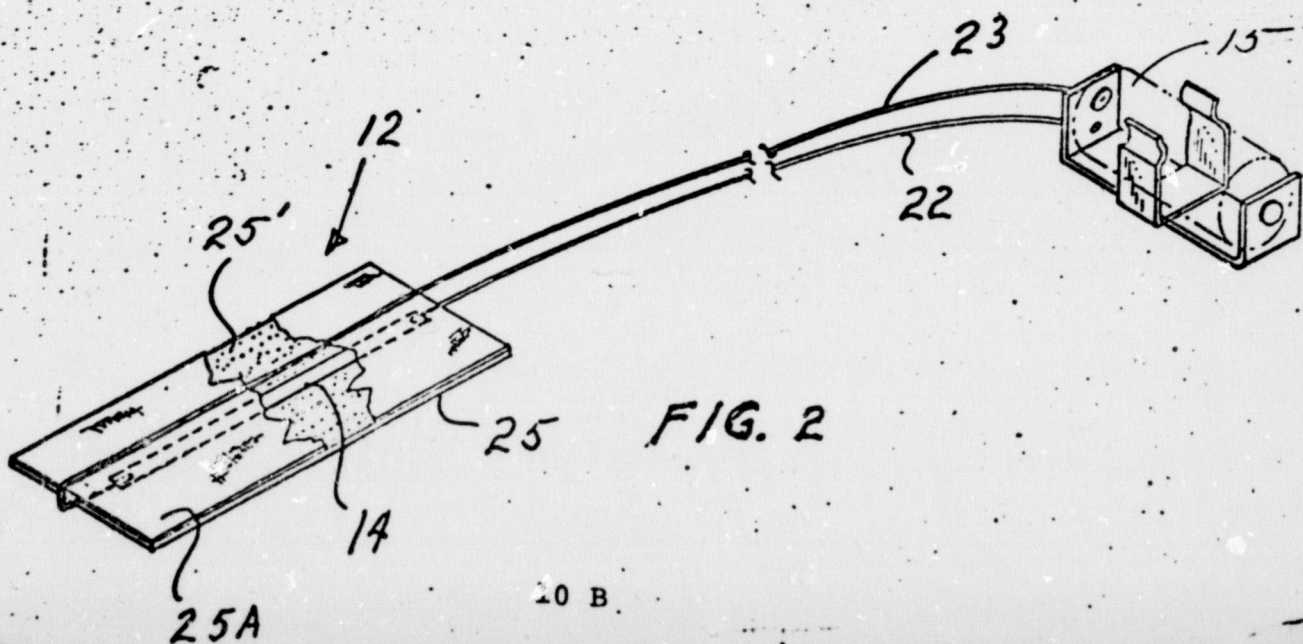
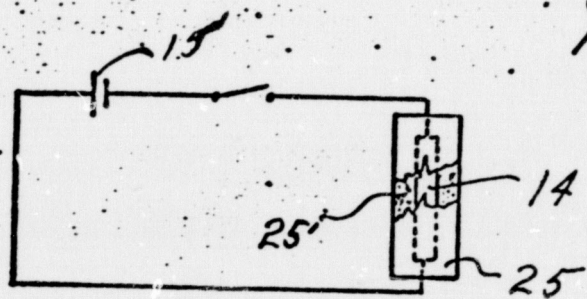
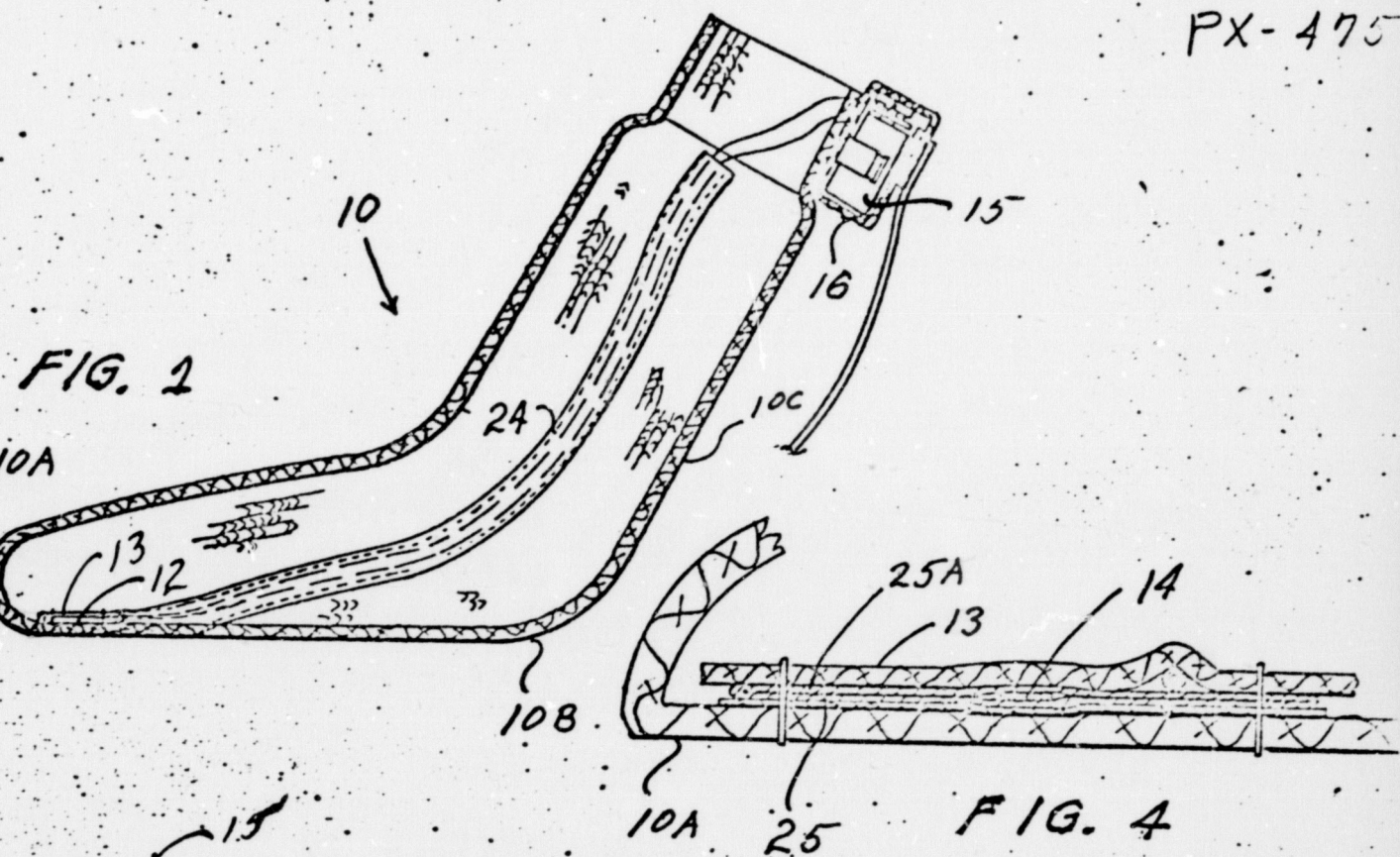
Defendants' structure utilizes a layer of adhesive 25' to adhesively secure the sandwiching sheets 25A, 25 in back to back relationship, and the adhesive electrically insulates the covering material 25, 25A from the resistor strip whether necessary or not,

Defendants' structure has electrical conductors or wires 22, 23 to connect the battery in circuit with the resistor strip 14,

Defendants' structure has a means 24, i.e., a tape for maintaining the conductors 22, 23 against the leg portion of the sock.

TENDANTS COMMERCIAL SOCK CONSTRUCTION

PX-475



A reading of this chart and a comparison thereof with the drawings attached will clearly demonstrate the manner in which Defendants appropriated and imitated Plaintiff Costanzo's patented sock concept. Actually, the written detailed description of the Costanzo patent PX-1 can be literally read onto the drawing of the Defendants' commercial sock construction (PX-475) when the Costanzo patent reference numerals are assigned to the corresponding component parts of the Defendants' commercial sock (PX-475) as indicated.

The attached chart of claim 2 of the Costanzo patent disposed side by side with the Costanzo patent drawing (PX-474) and the Defendants' commercial sock drawing (PX 475) should be conclusive evidence that Defendants not only appropriated Plaintiff-Costanzo's invention, but that they also infringed.

As the Trial Court noted (Joint Appendix 92) "The Arron and Costanzo sock patents although not identical, are essentially the same. Both patents disclose a self-contained battery heated sock with the heating element comprising a flat resistance ribbon adhesively secured between two heat conducting sheets located in the toe area of the sock and connected in circuit to a low voltage battery of less than 6 volts carried in a pouch secured to the sock." Graver Tank & Mfg. Co. v. Lind Air Products 339 U.S. 605.

Winan v. Denmead 56 U.S. 330; Georgia Pacific Corp. v. U.S. Plywood
258 F² 124 (2 Cir.); Kurtz v. Bell Hat Lining Co. 280 F at 281
(2 Cir.) Shaw Whiting Co. 317 F² 1097; Cert. denied 397 U.S. 1076.

THE ISSUE OF ARRON'S RULE 131 AFFIDAVIT - POINT II.

While the District Court found that Arron was guilty of "unclean hands" during the prosecution of the Arron sock patent (PX 2); it is urged that the District Court should have found that Arron committed a "willful and intentional fraud" on the Patent Office. The "fraud" on the Patent Office which Plaintiff proved at trial was the willful and intentional deceit exhibited by Arron in initially filing a Rule 131 Affidavit alleging a conception date prior to Costanzo, when in fact, Arron had conceived nothing. This was dramatically demonstrated at trial where Arron was requested to draw a sketch of the alleged concept he described in his Rule 131 Affidavit which he submitted to the Patent Office to swear back of the Costanzo Patent. All Mr. Arron was able to draw was a straight line. (PX-535)* (T.T. 689)*

The Trial Court correctly noted that the documents which Arron submitted together with his Rule 131 Affidavit completely failed to evidence any conception of the subject matter which Arron was describing and claiming in the Patent Application on which

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Attached hereto as Appendix 5 and 6 respectively.

his sock patent (PX-2) was granted. Yet, a close study of Defendant's Rule 131 Affidavit filed, and the arguments made with respect thereto were intentionally disguised to cover up the true facts solely to deceive the Examiner, and in fact, did deceive the Examiner, into believing that Arron had established conception date earlier than the filing date of the Costanzo application in issue. This fraudulent and seemingly apparent compliance with the Rule 131 Affidavit practiced before the Patent Office, it is submitted, is the "material misrepresentation" made by Arron which is tantamount to "fraud." The fact that Arron made willful and intentional alteration in the "conception letter" and "sales slip" to evidence diligence, the failure to disclose his association with Costanzo, and the failure to report known prior art once considered relevant on a preliminary search merely compounds the "initial fraud", viz., the filing of a Rule 131 Affidavit under circumstances

10

In the Trial Court's opinion and finding of fact (Joint Appendix 96) Judge Murphy stated:

"A comparison of the conception document and the application and amendments reveals that the conception letter does not disclose: (1) the sandwiching of the heating element between two sheets of material; (2) any location for the heating element; much less the specific location only under the base of the toes, (3) a covering material of low heat conductivity to decrease the spread of heat; and (4) a self-contained sock. These features were an essential part of the Arron patent."

known to Defendant not to warrant the filing of such Affidavit.

It is also submitted that sufficient evidence was presented at trial to establish that the Defendant filed the "fraudulent" affidavit solely for the purpose of deceiving the Patent Office into believing Arron was entitled to a conception date prior to the filing date of the Costanzo patent (PX-1).

Realizing after trial the ineffectiveness of Defendant's Rule 131 Affidavit, Defendants would now urge upon this Court that whereas the submitted documents failed to establish "conception" they nevertheless established a "reduction to practice." It is inconceivable that the Defendants can now urge a "reduction to practice" in the absence of any proved "conception." PX-84 which Defendants introduced at trial was an incomplete model of a sock construction allegedly made by Arron. It lacked any teaching or disclosure as to any power source or how the sock was to be energized. Further, there was absolutely no corroborating evidence introduced at trial as to when Defendant made the sock model evidenced by PX-84. The District Court was further correct when it noted that a pre-filing date of invention may not be established solely by the inventor's uncorroborated testimony citing Monoplastics Inc. v. Celdor Inc. 387 F² 20 (2 Cir. 1967); Rooted Hair Inc. v. Ideal Toy Co. 329 F² 761; and Thompson v. American Tobacco Co. 174 F2 773 (4 Cir. 1949). United Shoe Machinery

Corp. v. Brooklyn Wood Heel Corp. 77 F² 263, 264 (2 Cir. 1935). (Joint Appendix 94 - 96). The District Court thus correctly found that the evidence produced at trial was insufficient to prove either a "conception" or a "reduction to practice" by the Defendant Arron prior to the filing date of the Costanzo patent in suit. Thus the Court correctly concluded that the Costanzo patent is available as prior art in determining the obviousness of the Arron sock patent (PX-2).

WITH RESPECT TO POINT III - TIMELY'S ALLEGED INFRINGEMENT
LETTERS.

Defendants cite DX NN1-15 as letters sent by Timely to "alleged customers" of Defendant Arron. The Court is urged to note that with the exception of Alexander Sales, the trial record is completely devoid of any evidence that the parties to whom the letters DX NN1-15 were sent were customers of the Defendants.

The Court is urged to note specifically that the letters identified as DX-NN-4, DX-NN-5, DX-NN-10, DX-NN-11, DX,NN-13, DX-NN-14 and DX-NN-15 were letters addressed to defendants who have been named parties in this litigation and a companion law suit. These letters, together with the other letters which Defendants alleged were sent to their customers, but not proved, on a reading thereof will evidence that they were merely form letters advising

as to the granting of the Plaintiff's sock patent. As the District Court correctly found, these letters merely called attention to Plaintiff's patent as permitted by 35 USC 287. The District Court therefore correctly found the Plaintiffs were entitled to send such notices and that no evidence of bad faith was proven by Defendants (Joint Appendix 126).

WITH RESPECT TO POINT IV OF DEFENDANTS' BRIEF.

With respect to this claim, the Court is urged to note that Plaintiffs did prove price discrimination with respect to one or two of Plaintiff's customers. However, the Trial Court held that the proofs were insufficient to satisfy the requirement of "injury to competition." However, this Court is urged to note that during the discovery of this action, Plaintiff, Timely Products Corporation, was limited in its discovery by Court Order. Accordingly, Plaintiff, Timely Products Corporation, was permitted discovery with respect to only those customers which Plaintiff knew were lost because of Defendants' predatory pricing tactics. This discovery was therefore limited to only approximately 6 of 7 customers which were known to have been actually subjected to Defendants' predatory pricing tactics. Also, Plaintiff directs the Court's attention to the fact that "competition" in the present case is directed to only a very small selective market and for this reason, only a limited effect on "competition" could be shown,

since "competition was extremely limited.

WITH RESPECT TO PLINT V OF DEFENDANTS' BRIEF - THE
SENECA CANCELLATION.

Defendants allege that Timely Products caused the cancellation of Defendants' agreement with Seneca. As the Trial Court correctly noted, neither of the plaintiffs caused the cancellation of this contract. (Joint Appendix 125). As the Court noted, Arron himself caused the cancellation by accusing Seneca Mills of being unable to produce socks competitively and for not keeping accurate records (PX-282) (Joint Appendix 125). Seneca Mills in turn agreed to the cancellation, and further, accused Arron of breaching a warranty that Arron had patent rights to the sock when in fact he had none (PX-283). (Joint Appendix 125). It thus appears that Arron's entire claim of Plaintiffs' interference with the Seneca agreement was totally frivolous and unjustified.

Further, it is to be noted that Seneca agreed to the cancellation of its contract with Defendant Arron on April 7, 1966. (PX-283). Watkins, V.P. of Seneca testified that he did not meet with Mr. Hines, President of Timely Products, until April 13, 1966. (T.T. 814)*. Therefore, in view of the evidence, the Trial Court correctly found that Arron, and not Plaintiffs caused the cancellation of the Arron-Seneca agreement (PX-49).

* Attached hereto as Appendix 7.
-17-

In fact, Defendant Stanley Arron testified that he cancelled the Seneca agreement (T.T. page 775.)*

WITH RESPECT TO POINT VI AND VII OF DEFENDANTS'
BRIEF - "ON SALE" OF ARRON'S HEATER PATENT (PX-3)
AND OBVIOUSNESS THEREOF.

Defendants arguments with respect to this issue is clearly not supported by the evidence. Mr. Pillar, Defendants' own customer, testified he caused the advertisement (PX-472) in Outdoor Life to be published on or before November 5, 1965, more than one year prior to Defendant Arron's filing a patent application therefor. The advertisement contained a picture of Defendant's sock and accompanying copy.

Mr. Pillar further testified that the first proofs (PX-493) of the advertisement was submitted by the publication to him on September 30, 1965. Mr. Pillar further testified that at the same time he placed the ad, he placed an order for Defendant's sock construction.

Defendant Arron himself testified that it was also quite possible that a sale may have been made prior to a sale made to Mr. Pillar. (T.T. 780).** At any rate, the District Court found that there was ample evidence presented to prove that Defendant

*

Attached hereto as Appendix 8.

** Attached hereto as Appendix 9-18-

Arron caused the subject matter of his heater patent (PX-3) to be placed "on sale" more than one year prior to the effective date of the patent application therefor. This the court noted was in violation of 35 USC 102 (b); and which constitutes a statutory bar to any such patent grant.

The District Court correctly applied the law to the facts noted. As the trial court noted, the only difference between the Arron sock patent (PX-2) and the Arron heater patent (PX-3) was that the heater of the latter patent was secured by two rows of stitching instead of one row of stitching as in the former. This the court noted did not constitute a patentable distinction.

Furthermore, the court noted that Arron's Heater Patent was obvious in view of the Costanzo patent PX-1, the Jacobsen Patent 2,329,766 and Taylor Patent 2,287,915, the last two patents not cited by the Patent Office. The Costanzo patent teaches the concept of adhesively securing a resistance strip between two conducting sheets of material, and the Taylor patent teaches the sewing of a heater by opposed rows of stitching.

The Trial Court therefore correctly concluded that the Arron Heater Patent PX-3 is also invalid on the further ground of obviousness.

CONCLUSION:

It is respectfully urged that Defendants' Cross-Appeal be dismissed completely, and that the relief sought by Plaintiff as set forth in Plaintiff's main brief be granted.

Respectfully submitted,

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APPENDIX TO PLAINTIFF -
APPELLANT'S REPLY BRIEF

	<u>Page</u>
Trial Transcript Page 1304 Testimony of Anthony Costanzo	Appendix 1
Trial Transcript Page 1305 Testimony of Anthony Costanzo	Appendix 1A
Trial Transcript Page 1480 Testimony of Stanley Arron	Appendix 2
Trial Transcript Page 1481 Testimony of Stanley Arron	Appendix 2A
Trial Transcript Page 1856 Testimony of Mr. Dubrow Defendants' Expert	Appendix 3
Trial Transcript Page 1857 Testimony of Mr. Dubrow Defendants' Expert	Appendix 3A
Trial Transcript Page 1858 Testimony of Mr. Dubrow Defendants' Expert	Appendix 3B
Trial Transcript Page 143 Testimony of Mr. Dennis Murphy Plaintiff's Expert	Appendix 4
PX-535 S. Arron Drawing of Rule 131 Concept	Appendix 5
Trial Transcript Page 689 Testimony of Stanley Arron	Appendix 6
Trial Transcript Page 814 Testimony of Mr. Watkins	Appendix 7
Trial Transcript Page 775 Testimony of Stanley Arron	Appendix 8
Trial Transcript Page 780 Testimony of S. Arron	Appendix 9

1 A Yes. He did.

2 Q All right. Now, can you recall when you first saw
3 an actual sample of this heated sock?

4 A I believe it was the early part of 1964, either
5 January or February or March.

6 Q Now, can you describe the heated sock that you saw?

7 A Well, I think it was either white or gray and it had
8 a battery type thing that, you know, you have the flashlight
9 that you snap on and on the top of the sock, and it had a
10 heating element in the toe.

11 Q Now, was this sock completely operational?

12 A Yes, because I put it on and I wore it for about
13 three quarters of an hour, an hour or an hour and a half, some-
14 thing like that at that time.

15 Q Now, were you ever requested by your brother, Ray,
16 to witness documents of his inventions?

17 A From time to time I signed a notebook that he had.

18 Q I show you Exhibit 274 and ask you if you can find
19 your signature in that notebook?

20 A Yes. Here is one here. (Indicating.)

21 Q Which page is that on?

22 A Page 3, March 3, 1964. And here is another one here,
23 March 3, 1964. (Indicating.)

24 THE COURT: The same date, same page?

25 THE WITNESS: No, Your Honor. It's the

1 next page, I guess, or two.

2 THE COURT: And the date was?

3 THE WITNESS: March 3, 1964.

4 THE COURT: The same date, however?

5 THE WITNESS: Yes. Yes. And here is
6 another one. (Indicating.) I don't know what
7 the date is. Right here is my signature.
8 (Indicating.) August 5, 1965, Your Honor.
9 October 7, 1965. Here is another one, but this
10 is the same date. I don't see any others,
11 Your Honor.

12 Q Can you recall from looking at Exhibit 274 - - I will
13 strike that, please.

14 Did you sign that notebook on the dates indicated
15 by your signature?

16 A Yes, I did.

17 MR. PATTIBENE: That's all the questions

18 I have. }

19 THE COURT: Cross?

20 CROSS EXAMINATION

21 BY MR. KUNIN:

22 Q Did you try on a pair of socks or just one sock?

23 A I don't recall if it was a pair or if it was one.
24 I think it was one.

25 Q Did you put your shoe on over the sock?

1 A This is one of the socks that was sent to the
2 Penny laboratory in early 1966 as arranged by Jack Watkins
3 of Seneca Knitting Mills. This is one of the ones that was
4 tested and returned.

5 Q It is one of the actual socks?

6 A Yes, sir.

7 Q I ask you how many pairs of socks were sent to
8 the J. C. Penny laboratory?

9 A Two pair.

10 Q Were they identical?

11 A Yes, sir.

12 Q So that there were four socks that actually looked
13 alike?

14 A Yes, sir.

15 Q Now, referring to the battery holder which says
16 Ski-Lectrics on it, do you recognize that?

17 A Yes, sir.

18 Q Would you explain what that is?

19 A This sock came from the summary judgment hearing
20 and this is one of my battery holders I attached on there to
21 show how the battery was attached to the heating wires at the
22 top of the sock -- not the heating wires. I mean the
23 connecting wires.

24 Q When you say "one of my battery holders", what do
25 you mean?

1 A Well, when I went into making my own socks in
2 1966, this is the type of battery holder that I used to hold
3 the battery.

4 MR. KUNIN: I offer this as a full exhibit,
5 Your Honor.

6 MR. FATTIBENE: No objection.

7 (Sock, Ski-Lectrics received in evidence
8 and marked Defendants' Exhibit F-1-F.)

9 BY MR. KUNIN:

10 Q Mr. Arron, did I understand you to say -- when
11 was the Penny tests that were made on F-1-F?

12 A We submitted the socks around May 22 or May 25.

13 Q Of what year?

14 A 1965.

15 Q Now, referring to Exhibit DX-ZZ-2 -- I believe
16 this is a full exhibit already -- would you explain the
17 circumstances under which that was written?

18 A Well, there arrived a point where in my relations
19 with Seneca Knitting Mills that they wanted to get out of
20 the contract and they asked me if I would release them in
21 writing so that they would have it on record. So I thought
22 of the mildest reason I could and sent them this letter.

23 Q Now, referring to Exhibit DX-ZZ-1, I ask if you
24 can identify that and explain the circumstances under which
25 you wrote this letter?

1 Q (Hands pencil to witness.)

2 A In this particular case --

3 THE COURT: "This" being Figure A?

4 THE WITNESS: In Figure A -- well, or Figure B,
5 I am not comparing X and Y now, the X and Y materials. But in
6 general, heat will flow from this resistor element with this
7 cross hatch between the two layers.

8 Q Can we call that R?

9 THE COURT: No. Let him do it now, counsel,
10 and you add later. The heat flow is from the resistor strip --

11 THE WITNESS: The resistor element which is
12 cross hatched in the figure, either figure, and flow will be
13 in this picture in the paper I have before me, vertically up,
14 vertically down and vertically to the left and to the right.
15 Heat will flow in all directions as long as there is a lower
16 temperature around the outside of the heater strip of the
17 X or Y materials strip or if material X or Y were cooler than
18 the heater which is expected, of course, heat will flow up,
19 it will flow down, it will flow to the left and to the right.

20 Q And that would occur in both cases where the material
21 in one case is material X and it would flow in the same way
22 in material Y?

23 A Well, when you say "way", it will flow in all four
24 directions.

25 Q Four directions?

A Yes. That is correct.

Q Regardless of what the material is?

A Yes. But lower conductivity materials, the flow will not be in one direction, it will be in one direction less than in other directions, depending on where the resistance -- I have not split up the flow. I have stated flow will be in all four directions. I have not allocated the amount of heat flow in each direction. I have simply stated that up, down and to the left and right are possible paths of heat transfer.

THE COURT: No matter what the material?

THE WITNESS: That is correct.

THE COURT: Next question.

MR. FATTIBENE: I would like to introduce this as an exhibit, Your Honor.

THE COURT: We will call it F-1.

MR. KUNIN: It is not on the exhibit list, Your Honor.

MR. FATTIBENE: 539.

(Drawing received in evidence and marked Plaintiffs' Exhibit 539.)

MR. FATTIBENE: Your Honor, I don't think I have any more questions of this witness.

THE COURT: Any redirect?

MR. KUNIN: No further questions, Your Honor.

THE COURT: Thank you, sir. Both sides rest?

1 embodiment using metallic foil, such as aluminum foil, but
2 it is not limited to this.

3 Q Now, I direct your attention to Exhibit Number 7.

4 THE COURT: Would you go over that last one
5 again? Were you talking about one of the claims in the
6 Costanzo patent?

7 MR. FATTIBENE: No. I asked him whether or
8 not claim two is limited in any way with respect to the
9 nature or type of covering material.

10 THE COURT: It doesn't mention it at all,
11 does it?

12 THE WITNESS: No. There is no limitation.

13 THE COURT: Well, there is no limitation,
14 it doesn't describe it at all.

15 THE WITNESS: In the body of the patent?

16 THE COURT: No. In the claim.

17 THE WITNESS: No.. In the claim, none.

18 THE COURT: All right. }

19 Q I direct your attention to plaintiffs' Exhibit
20 Number 7 which is another of defendant's sock construction.
21 Now, can you describe --

22 THE COURT: I am confused now. We are now
23 talking about Exhibit 7?

24 MR. FATTIBENE: 7 which is an earlier version
25 of the defendant's construction. It has been stipulated that



Appendix 5

1 the number, I guess.

2 MR. FATTIBENE: 535, PX-535.

3 (Sketch - straight line received in evidence
4 and marked Plaintiffs' Exhibit 535.)

5 Q Now, Mr. Arron, I ask you, is Exhibit 535 a
6 drawing which you made which represents the concept disclosed
7 in your August 23, 1965 letter?

8 A It does not record the entire concept, but it
9 represents the type of heating strip referred to.

10 Q Well, wasn't the question to you to draw your
11 entire concept?

12 A Let me see if there is anything in here that isn't
13 covered by what I drew.

14 Q Will you state what you drew?

15 A I drew a representation of a four inch strip of
16 resistance ribbon.

17 Q And what does it look like on the drawing itself?
18 A straight line?

19 A Straight line, four inches long, about sixteenth
20 or more of an inch thick.

21 THE COURT: What did you say it was, a
22 four inch --

23 THE WITNESS: It is four inches long and on
24 the order of sixteenths of an inch thick.

25 THE COURT: But it represents the heating
strip?

1 with Mr. Fattibene after January 21, 1966?

2 THE COURT: He just said that there were
3 several conversations, and in one of them, Mr. Fattibene
4 arranged for a meeting with Mr. Hines.

5 Q Well, can you give us the dates of these subsequent
6 conversations, if you recall them or have them in your notes?

7 A There was the first one I mentioned, there was --
8 I have a note here, March 25, 1966, and I have a note here
9 of April 13, where I had lunch with Mr. Hines. I remember
10 that and I talked to Mr. Fattibene several times after that,
11 but I don't have any more notes on it at all.

12 Q About how many times in all would you say you
13 spoke with Mr. Fattibene?

14 A I would say four, maybe more. I don't know for
15 sure.

16 Q Now, what was the general topic discussed in these
17 conversations? You don't have to pinpoint each particular
18 conversation, but what message was Mr. Fattibene trying to
19 convey to you?

20 A I think he advised me that there was litigation
21 between Mr. Hines and Stanley Arron and he asked me questions
22 pertaining to these heated socks.

23 Q Do you recall what the questions were?

24 A He asked me questions about our relations with
25 Mr. Arron, and I would say they were general. I can't really

1 THE COURT: Does the letter so indicate?

2 MR. FATTIBENE: No. It doesn't. It just
3 says he spoke to Mr. Piller.

4 Q Now, did Mr. Piller run the ad in a magazine in
5 October?

6 THE COURT: Well, aren't you betting a
7 dead horse?

8 MR. FATTIBENE: Well, maybe I am, Your Honor.

9 Q All right. Let me ask you this question: How
10 long did your contract with Seneca stay in effect?

11 A The contract that I -- you mean the contract
12 that I negotiated with Seneca in October of '65?

13 Q September of '64 or was it September -- no. No.
14 1965. I am sorry.

15 A It stayed in effect until early 1966, around
16 March, if I recall.

17 Q Did you cancel that contract?

18 A Yes.

19 THE COURT: Until March of '66?

20 THE WITNESS: Yes, Your Honor.

21 Q You initiated the termination?

22 A I did not initiate the termination.

23 THE COURT: Can I make a guess: Was it
24 some charge that they were contributing to the infringement?

25 THE WITNESS: Yes, Your Honor. It was

1 A Yes. Oh, wait a minute. Excuse me. No. Again,
2 you are asking me about somebody else's activities. Now,
3 they have a salesman named Tom Scan who made a trip out west
4 and he had a very rough sample. I understand he did some
5 business. Now, I don't know exactly what date that was. It
6 may have -- it was, obviously, around the time that
7 Alexander Sales may have purchased some although I really
8 can't answer that with any great accuracy.

9 THE COURT: Well, for all practical purposes,
10 Piller was the first customer?

11 THE WITNESS: He was the first customer,
12 but in terms of actually making the first purchase, it may
13 have been an account that said to the salesman, "Yes. I
14 will take some. Send me some.", which I don't know about.

15 Q Now, didn't you then go into business under the
16 trade name Visa-Therm Incorporated?

17 A What do you mean by that?

18 THE COURT: Visa-Therm Incorporated is the
19 trade name.

20 MR. FATTIBENE: No. I am sorry. Visa-
21 Therm.

22 THE WITNESS: You mean after the cancellation?

23 Q After you cancelled the Seneca agreement?

24 A Yes, I did.

25 Q Did you under this trade name continue to manu-

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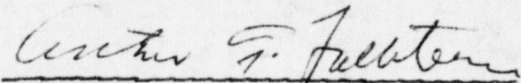
COTTON CONTENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Raphael J. Costanzo,	:	
Plaintiff-Appellant	:	
vs.	:	CIVIL APPEAL
	:	Docket No. 74-2455
Stanley Arron, Visa Therm Products, Inc.	:	
Anna Arron, Anna Arron Executrix of	:	
Estate of Max Arron,	:	
Defendants-Appellees	:	

Certificate of Service

I, Arthur T. Fattibene, hereby certify that two (2) copies of Plaintiff-Appellant's Reply Brief, and two (2) copies of the Joint Exhibit Appendix have been mailed, post paid to Defendants-Appellees' counsel, Edward Kunin, 285 Golden Hill Street, Bridgeport, Connecticut, and Ernest Junkins, 855 Main Street, Bridgeport, Connecticut on April 16, 1975.


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